the balance of probabilities, the statutory presumption of trafficking by virtue of the weight of the heroin exceeding 15 grammes in weight.

The accused was therefore found guilty, and convicted as charged and was sentenced to death by hanging according to law.

SYED HUSSEIN BIN SALIM ALATTAS & 2 ORS (TRUSTEES OF THE ESTATE OF SYED HASSAN BIN AHMAD ALATTAS)

v.

SYARIFAH RUGHAYAH BTE IDROS

HIGH COURT, JOHOR BAHRU
TUAN HAIDAR BIN MOHD. NOOR J.
[ORIGINATING SUMMONS NO. 24-551-1992]
19 JULY 1993

LAND LAW - Removal of private caveat - Proprietors of land applied to remove caveat - National Land Code 1965 s. 327 - Application resisted by caveator - Whether caveator had caveatable interest in land - Whether interest of caveator raised serious issue to be tried - Onus of proof.

LAND LAW - Procedures relating to entry of private caveats - National Land Code s. 323(2) - Requirements of section not complied with - Whether caveator disqualified from lodging caveat - Caveat extended by Court at ex-parte hearing - Material facts not disclosed at hearing - Whether non-disclosure constituted ground for removal of caveat - Undue delay in lodging caveat - Effect.

The defendant in this case had entered a private caveat over a parcel of land of which the plaintiffs were the registered proprietors and trustees. The defendant lodged the caveat to protect her purported beneficial interest in the land which she claimed to have arisen in the form of a trust. However, in her application for the entry of the caveat, which was made under section 323(1)(b) of the National Land Code 1965, there was no mention whatsoever of this purported trust.

Subsequent to this lodgement, the defendant applied *ex-parte* to the Court for an extension of the caveat, and by an order dated 4 July, 1992 the application was granted and the caveat accordingly extended. The facts however showed that in the application for the said extension, certain material facts were not disclosed to the Court by the defendant. And the facts further showed that the defendant waited for 21 years before asserting her claim in respect of the alleged interest in the land.

The plaintiffs applied, *inter alia*, for an order that the order of court dated 4 July 1992 be set aside and for a further order that the caveat be removed from the relevant Registry.

The questions that arose were:

1. Whether the defendant had satisfied the *onus* of proving that she had a caveatable interest in the land and that the interest, if there was any, had in fact and in law raised a serious issue to be tried ;

2. Whether the defendant's non-compliance with the requirements of section 323(2) of the National Land Code 1965, disqualified her from lodging the caveat in question ;

3. Whether the defendant's failure to disclose material facts at the *ex-parte* hearing for the extension of caveat, by itself, afforded sufficient reason to remove the caveat; and

4. Whether undue delay in filing a caveat was good ground for its removal.

Held:

[1] The defendant has failed to show that she has a caveatable interest in the land nor has she shown that a serious issue to be tried existed in respect of her interest in the land as the purported "trust" which allegedly created her said interest, was non-existent.

[2] The facts in this case indicated that in her application for the entry of the caveat, the defendant did not expressly state therein her interest in the form of "trust" as she purportedly claimed. This failure to disclose her interest of the purported "trust", which in effect amounted to non-compliance of the requirements of section 323(2) of the Code,is fatal as it leads to the irresistable inference that her claim was baseless, frivolous and vexatious.

[3] In her *ex-parte* application to extend the caveat the defendant failed to disclose material facts as she failed to disclose the assignment of her house on the said land and on this ground alone the plaintiffs should succeed to set aside the order extending the caveat and consequently to get an order to remove the caveat.

[4] Delay alone is a ground to remove a caveat. In this case there was a delay of about 21 years in filing the caveat by the defendant. There was also undue delay by the defendant in filing the action to assert her claim to be beneficially entitled under the purported "trust" in the said land. No reasons have been advanced for the delays and in the circumstances the caveat must be deemed to be vexatious.

[Plaintiffs application allowed with costs].

Cases referred to:

Wong Kuan Tan v Gambut Development Sdn Bhd [1984] 2 MLJ 115 ***(foll)***

*Tan Heng Poh v Tan Boon Thong & Ors [1992] 2 MLJ 5 (**foll**)*

*Ooi Bee Tat Development Sdn Bhd v Ooi Bee Tat @ Ooi Bee Lee [1985] 1 CLJ 449 (**refd**)*

*Teo Ai Choo v Leong Sze Hian [1982] 2 MLJ 12(**refd**)*

*Plimmer Bros. v St. Maur [1906] 26 NZLR 294(**refd**)*

*Oversea Investment Pte. Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 332 (**foll**)*

Legislation referred to:

National Land Code 1965 ss. 323(1)(b), 323(2), 327 & 417.

For the plaintiffs - Robert Lai (Fadzillah with him); M/s Jackson & Masacorale

For the defendant - Mahendran; M/s Mahendran & Co.

JUDGMENT

Haidar bin Mohd. Noor J:

The plaintiffs as trustees of the Estate of Syed Hassan bin Ahmad Alattas filed this originating summons ('OS') for an order that the order of Court dated July 14, 1992 extending the private caveat registered in the Registry of Titles, Johor Bahru under serial no. 8498/90 Jld. 506 Fol. 67 dated December 27, 1990 affecting all that land comprised in grant 26994 Lot 7371 Bandar Johor Bahru be set aside and that the Registrar of the Registry of Title, Johor Bahru, be directed to remove the said private caveat. In addition thereto for an order that costs be paid by the defendant to the plaintiffs and expenses, damages and losses suffered by the plaintiffs as a result of the said private caveat to be assessed by the Court.

The OS is filed under sections 327 (1) and 417 of the National Land Code 1965 ('NLC'). It is supported by the joint affidavit of the surviving trustees of the Estate of Syed Hassan bin Ahmad Alattas namely, Syed Hussein bin Salim Alattas, Syed Salleh bin Syed Rahman Alattas and Syed Kadir bin Mohd. Alattas.

Both Counsels agreed that the plaintiffs as trustees, are the registered proprietor of the land in question, that is, Lot 7371 in grant 26994. It would appear to me that if the plaintiffs succeed in getting the caveat removed, the first plaintiff stands to gain as the plaintiffs (including the first plaintiff) as trustees can then take action to transfer Lot 7371 ("the said land") to the first plaintiff personally based on the alleged sale of the said land to the first

plaintiff personally by one Syed Hood. The issue would seem to be centred on the alleged sale of the land, that is, Syed Hood disclaiming that there was such a sale and the defendant claiming that Syed Hood held the said land in trust for her.

As it is not disputed that the plaintiffs as trustees are the registered proprietor of the said land the *onus* of proof that the caveat should remain lies on the caveator. In this respect, the Federal Court in *Wong Kuan Tan v. Gambut Development Sdn. Bhd.* [1984] 2 MLJ where at page 115, Hashim Yeop A. Sani, F.J. (as he then was) said:

> The nature of the *onus* which lies upon a caveator in an application by the caveatee under section 327 of the National Land Code is settled in *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212. If an applicant is the registered proprietor of the land he need only show that he is the registered proprietor. His registered titled is *prima facie* evidence of his unfettered right to deal with the land as he pleases. It is then for the caveator to satisfy the court that there are sufficient grounds in fact and in law for the caveat to be extended. The caveator must satisfy the Court that on the evidence presented his claim to an interest in the land raises a serious question to be tried and having done so he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the main action.

His Lordship went on further to say on the same page:

> To put it more simply, the caveator in this case must first satisfy the Court that he has a "caveatable interest" in the land. Only if he has such an interest can he qualify to lodge a caveat under section 323 of the National Land Code. In the application to have the caveat removed the *onus* is cast upon the caveator to satisfy the Court that on the evidence presented his claim to an interest in the land raises a serious question to be tried and after having done so he must go on to show that on the balance of convenience the caveat should be extended until the disposal of the main action.

Under section 323 (1) of the NLC, the persons, and bodies at whose instance a private caveat may be entered are:

(a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

(c) the guardian or next friend of any minor, claiming to be entitled as mentioned in paragraph (b).

Section 323 (2) of NLC then sets out the procedure for the application of the entry of a private caveat. In this respect in the case of *Tan Heng Poh v. Tan Boon Thong & Ors.* [1992] 2 MLJ at page 5, the Supreme Court in considering section 323 (2) of the NLC, said:

> Section 323 (2) expressly requires, firstly, that Form 19B should be used, and secondly, that the caveator must specify therein not only the nature of the claim on which his application is based but also to state expressly whether the caveat is to bind the land or a particular interest only. In our view non-compliance with these requirements may be fatal and may be a valid ground for removing a caveat at the instance of the applicant.

The first question for me to consider is whether the defendant had shown that she has "caveatable interest" in the said land. From the facts disclosed in her affidavit it would seem to indicate that the defendant is relying on "trust" purportedly established in her favour in respect of the said land. She got one Syed Hood to file an affidavit to support her claim to be beneficially entitled under the purported "trust". If that be the case, then the defendant must have entered the caveat under section 323 (1) (b) of NLC. It is then necessary to examine Form 19B and the statutory declaration filed by the defendant in her application for the entry of the private caveat. In exhibit T-1, Form 19B and the statutory declaration marked as "SR - 3" showed that the caveat was intended to cover the whole of the said land to safeguard the defendant's and Syed Hood's interests. However, she did not expressly state therein her interests in the form of 'trust' as she purportedly claimed. Document 'A' referred to in paragraph 1 of the statutory declaration referred to the power of attorney dated November 15, 1990 appointing her as attorney by Syed Hood to deal with the said land (T-12). Nowhere in the said document was there a mention made of the purported 'trust'. In respect of document 'B' enclosed therein it referred to the agreement of sale and power of attorney between Sharifah Noor as vendor and Syed Hood as purchaser for a consideration of RM2,000 (T-2). It is not disputed that Sharifah

Noor as the daughter of Syed Hassan bin Ahmad Alattas (deceased) was allocated the said land under a Deed of Family Arrangement dated September 10, 1959 and duly sanctioned by the Court on September 17, 1959. She would in the circumstances be in a position to effect the agreement of sale in respect of the said land. Again, nowhere in the said document was there a mention made of the purported 'trust'. It seems clear to me that she did not sufficiently particularise the nature of her claim in her application for the entry of the private caveat. Following the case of *Tan Heng Poh v. Tan Boon Thong, supra*, the non-compliance of the requirements of section 323 (2) may be fatal and may be a valid ground for removing a caveat at the instance of the applicant, ie. the plaintiffs. The failure to disclose her interest of the purported 'trust' in this case in my view, is fatal as it leads to the irresistable inference that her claim was baseless, frivolous and vexatious (see *Tan Heng Poh v. Tan Boon Thong & Ors, supra*, at page 6.)

Further, in her *ex-parte* application to extend the caveat the defendant in her affidavit (T-1) failed to disclose material facts, ie. the assignment between her as vendor and Syed Hood as purchaser in respect of her house only on the said land for RM1,000 (see T-3). The defendant claimed that T-3 is a false document and I will deal with it later. It has been held that failure to disclose material facts in an *ex-parte* application may be set aside irrespective of the merits and the question of balance of convenience does not arise (see *Ooi Bee Tat Development Sdn. Bhd. v. Ooi Bee Lee* [1985] 1 CLJ 449). On this ground alone the plaintiffs should succeed to set aside the order extending the caveat and consequently to get an order to remove the caveat.

To go one step further, it has been held that delay alone is a ground to remove a caveat (See *Teo Ai Choo v. Leong Sze Hian* [1982] 2 MLJ 12). In this case there was a delay of about twenty-two years in filing the caveat by the defendent (see T-2 and SR-3). Further, the defendant filed the action to assert her claim to be beneficially entitled under the purported 'trust' in the said land only in February 1993 thereby showing lack of *bona fide* in her purported claim. No reasons have been advanced for the delay and in the circumstances the caveat must be deemed to be vexatious (see *Plimmer Bros. v. St. Maur* [1906] 26 NZLR 294).

As to the allegation of the defendant that the plaintiffs being in possession of the relevant title deed in respect of the said land failed to execute the necessary transfer of the said land to the first plaintiffs (see paragraph 3 of encl. 11) the plaintiffs at paragraph 4 of their joint affidavit in reply (encl. 15) explained the delay. According to the plaintiffs the said land was put under intended acquisition by the State Authority since 1980 and was not lifted until 1989. They came to know of the withdrawal only sometime end of 1989 as the notice of withdrawal was wrongly addressed. By the time they made enquiries at the Land Office, the defendant had lodged the caveat.

However, assuming that the defendant has sufficiently complied with the requirements of section 323 (2) of the NLC, thereby qualifying her to lodge a caveat, in the application to have the caveat removed the *onus* is cast upon her as the caveator to satisfy the Court that on the evidence presented her claim to an interest in the said land, purportedly under the 'trust', raised a serious question to be tried.

The agreement of sale and power of attorney executed between Sharifah Noor as vendor and Syed Hood as purchaser for the sum of RM2,000 ('T-2') is not disputed. However, it is to be noted that nowhere in T-2 was there a mention made of the purported 'trust' as claimed by the defendant. The assignment between the defendant as vendor and Syed Hood as purchaser in respect of her house built on the said land for RM1,000 (T-3), if not for the allegation by the defendant that T-3 was false, would show or even strengthen the fact that the said land and the house were sold to Syed Hood and Syed Hood did not hold the said land and the house in trust for her. What then is the basis of her claim that T-3 was a fake document?. She claimed that she was in Sabah when T-3 was allegedly signed by her in the presence of solicitor, C.K.G. Pillay (see paragraph 7 of encl. 11). A perusal of the affidavit of Syed Hood (encl. 12) in support of the defendant's claim of the purported 'trust', Syed Hoood did not depose that T-3 was a fake document. On the other hand we have the affidavit of C.K.G Pillay, the solicitor before whom T-3 was executed that the signature on T-3 was confirmed as his (C.K.G Pillay's) (encl. 19). Mr. Pillay deposed that he would not have witnessed the

signatures of the parties unless they were before him when T-3 was executed (see paragraph 4 of encl. 19). The contents of encl. 19 had not been challenged by the defendant and in that event I have to accept the facts deposed by Mr. Pillay as true (see *Oversea Investment Pte Ltd. v. Anthony William O' Brien & Anor* [1988] 3 MLJ 332). In other words, the signatures on T-3 were those of the defendant and Syed Hood.

In respect of the agreement between Syed Hood as vendor and Syed Hussain bin Salim Alattas as purchaser for the sale of the said land together with the house for RM8,000 (T-4) before solicitor, Shariff bin Mohd. Ali, Syed Hood claimed that T-4 was false and he did not sign on T-4 nor did he receive the sum of RM4,000. However, we have the affidavit of the solicitor, Shariff bin Mohd. Ali (encl. 20) rebutting the allegations of Syed Hood. Shariff deposed that he still has the copy of the agreement in his file and undertook to produce same if required by the Court. Shariff produced a copy of the file cover showing the acknowledgement of receipt of a copy of the said agreement by the parties thereto and the receipt of the sum of RM4,000 by Syed Hood (see 'MSA-2'). According to Shariff, the first plaintiff paid the consideration therein stated in the said agreement. There has been no challenge by the defendant on what was deposed by Shariff as true (see *Overseas Investment Pte. Ltd. v. Anothony William O' Brien & Anor, supra*). The allegations against the solicitors are serious and if there is an element of truth in her allegations the defendant should lodge complaints to the Bar Council. This she failed to do. As to the further sum of RM10,000 offered by the first plaintiff it was explained by the plaintiffs in paragraph 7 of encl. 2 that since the dispute was going on for some time since 1990 it was decided to resolve the differences by Syed Hood accepting RM10,000 to be paid to the defendant. It is to be noted that the parties to the dispute in respect of the said land are related. That was how T-6 and T-7 came about. However, Syed Hood reneged on his agreement and returned the sum of RM10,000 to the solicitors for the plaintiffs and produced an agreement of sale and power of attorney between him and the defendant for the sum of RM28,000 (T-8). On top of that he lodged a police report dated August 1, 1991 alleging that he was tricked into signing T-7. Again we have the situation here where the persons who were present when Syed Hood signed T-7, filed affidavits (see encl. 14, 16, 17 and 18) when all deposed that the contents of T-7 were explained by the solicitor, Cik Fadzillah (encl. 14) and Syed Hood understood the contents of T-7 before signing it and 'a doa' was recited after the execution of T-7 to signify that the whole problem or dispute had been settled amicably. There has been no rebuttal of the facts deposed thereto except for he police report lodged by Syed Hood. There has been no explanation by the defendant as to what happened as a result of the police report lodged. In the face of the uncontroverted facts I could not see why I could not accept the truth of the affidavits in encls. 14, 16, 17 and 18 (see *Overseas Investment Pte. Ltd. v. Anthony William O' Brien & Anor, supra*). Even looking at the affidavit of solicitor, Lee Boon How (encl. 13) explaining how T-8 was executed, there is still no mention of the purported 'trust' as claimed by the defendant. There was no evidence of the registration of the purported 'trust', if any, and neither was it exhibited to support her claim.

In the circumstances from the facts disclosed in the various affidavits filed by both parties and the various documents exhibited thereto I was satisfied that the defendant had not shown or raised a serious question to be tried in respect of her interest by way of the purported 'trust' created in respect of her beneficial right to the said land. In view of my finding the balance of convenience issue did not require any consideration.

For the reasons set out by me I made an order in terms of the plaintiffs' application with costs.